Shearn Delamore & Co v Sadacharamani a/l Govindasamy

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–841 OF 2006

B

HAMID SULTAN, PRASAD ABRAHAM AND ASMABI MOHAMAD JJCA

14 NOVEMBER 2016

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Tort — Negligence — Professional negligence — High Court held appellant as professional legal firm liable in negligence for opinion given to respondent — Applicable standard of care in professional negligence — Whether standard of care pleaded by respondent — Whether respondent pleaded standard of care correctly — Whether learned trial judge addressed issue of applicable standard of care

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The present appeal arose from the decision of the learned High Court judge who held that the appellant as a professional firm of advocates and solicitors was liable in negligence in respect of opinion given by the appellant relating to intellectual property rights to the respondent. The issues for court's determination were: (a) on the applicable standard of care in cases of professional negligence; (b) whether the standard of care was to be pleaded; (c) whether the respondent pleaded the standard of care correctly; and (d) whether the learned trial judge addressed the issue of the applicable standard of care.

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Held, allowing the appeal and setting aside the decision of the High Court with costs of RM50,000 here and below subject to allocatur:

(1) The learned trial judge on the face of the judgment fell into grave error of law when he dealt with the case as it was a negligence case without taking into consideration the elements and the burden placed on the respondent in professional negligence cases. In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession. Further, it is well settled that in professional negligence, the burden is on the plaintiff to establish the standard of care has been breached before the defendant is required to call his witness to rebut the same. In the instant case, the failure of the learned trial judge to take cognisance of the pleading rules as to 'standard of care' and failing to appreciate the respondent had not satisfied the requirement of the elements of standard of care principles by way of evidence at the stage of the plaintiff's case warranted the judgment to be set aside as of right (see paras 4, 11, 13 & 15).

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[Bahasa Malaysia summary

Rayuan ini berbangkit daripada keputusan hakim Mahkamah Tinggi yang memutuskan bahwa perayu sebagai firma profesional peguam bela dan peguam cara bertanggungan dalam kecuaian berkenaan pandangan yang diberikan oleh perayu berkaitan kepada hak harta intelektual kepada responden. Isu-isu untuk penentuan mahkamah adalah: (a) atas stardard berhati-hati yang boleh diguna pakai dalam kes-kes kecuaian profesional; (b) sama ada standard berhati-hati dikehendaki diplidkan; (c) sama ada responden memplid standard berhati-hati secara betul; dan (d) sama ada hakim perbicaraan mempertimbangkan isu stardard berhati-hati yang boleh diguna pakai.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi dengan kos sebanyak RM50,000 di mahkamah ini dan Mahkamah Tinggi tertakluk kepada alokatur:

(1) Hakim yang bijaksana atas penghakiman telah tersilap dari segi undang-undang apabila berurusan dengan kes kerana ia adalah kes kecuaian tanpa mengambil kira pertimbangan elemen-elemen dan beban yang diletakkan ke atas responden dalam kes-kes kecuiaan profesional. Berkaitan profesional, standard berhati-hati yang dijangka adalah pengamal undang-undang yang munasabah dalam profesion tersebut. Selanjutnya, adalah undang-undang nyata bahawa kecuaian profesional, beban adalah ke atas plaintif untuk membuktikan standard berhati-hati telah dimungkiri sebelum defendan dikehendaki untuk memanggil saksinya untuk mematahkannya. Dalam kes ini, kegagalan hakim yang bijaksana untuk mengambil tahu mengenai peraturan-peraturan pliding terhadap 'standard of care' dan gagal untuk menghargai responden tidak mematuhi kehendak elemen standard prinsip-prinsip berhati-hati melalui keterangan di peringkat kes plaintif mewajarkan penghakiman tersebut sebagai hak diketepikan (see paras 4, 11, 13 & 15).]

Notes

For cases on professional negligence, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1641–1737.

Cases referred to

Dato' Dr V Thuraisingam & Anor v Sanmarkan a/l Ganapathy & Anor [2016] 3 MLJ 227; [2015] 8 CLJ 248, CA (refd)

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590; [2016] 8 CLJ 293, FC (refd)

Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd [2016] 4 MLJ 389; [2016] 7 CLJ 679, CA (refd)

Lanphier and Wife v Phipos [1835-42] All ER Rep 421 (refd)

Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma) [2006] MLJU 473; [2007] 1 CLJ 50, HC (refd)

Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor [2016] 3 MLJ 742; [2016] 6 CLJ 225, CA (refd)
Swamy v Matthews & Anor [1968] 1 MLJ 138, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Appeal from: Civil Suit Nos D-5–22–260 of 1996 and D2–22–422 of 1996 (High Court, Kuala Lumpur)

Darryl Goon (Harish Nair and Maidzuara Mohammed with him) (Raja Darryl & Loh) for the appellants.
MS Murthi (Murthi & Partners) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant (a professional firm of advocates and solicitors) appeals against the decision of learned High Court judge who ruled that the appellant was liable in negligence and ordered for assessment of damages. The action arose in respect of opinion given by the appellant relating to intellectual property rights.

[2] The amended memorandum of appeal reads as follows:

> Shearn Delamore & Co, the Appellant above-named, appeals to the Court of Appeal against that part of the decision of the Honourable Justice Dato' Kang Hwee Gee given at the Kuala Lumpur High Court on the 28.7.2006, as decides that the 2nd Plaintiff's action in Civil Suit No. D5–22–260–1996 be allowed with costs and with damages to be assessed on the following grounds:
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> 1. In allowing the Respondent's (2nd Plaintiff) claim in the action against the Appellant (Defendant) with costs and ordering that interlocutory judgment be entered for the Respondent with damages to be assessed and costs, the learned Judge erred in law and/or in fact in holding that the Appellant was negligent and/or in breach of its duty of care owed to the Respondent on grounds that had not been pleaded by the Respondent.
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> 2. The learned Judge erred in law and/or fact in holding that the Appellant was negligent and/or in breach of its duty of care owed to the Respondent in making the following findings:
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> 2.1. that neither of the 2 legal opinions rendered by the Appellant to the Respondent addressed the –
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> '... probable reaction and counter action from IEV that the Plaintiff would have to bear and for how long and whether the Plaintiff would have the stamina to ride out a sustained litigation that would follow should he decide

to act on the defendant's advice to exploit his invention';

2.2. that the Appellant –

'... was duty bound to advise the plaintiff of any consequence which would likely follow should the plaintiff acted to exploit his invention based on the written 2 opinions to the plaintiff to go ahead to exploit his invention, given the fact that IEV had by then successfully had its patent registered in this country and had issued a notice of infringement of its patent and threatening legal action';

2.3. that –

'There was also a duty on the part of the defendant to properly advise the plaintiff of the financial implication that he may have to encounter in proceeding to exploit his invention in the face of the IEV patent; from having to defend an interlocutory injunction in the immediate future – and inevitable consequence which must invariably follow under the circumstances from the patent holder IEV, the immediate effect of which would put the Plaintiff's attempt to exploit on hold and stretch his resources and stamina and in the end prevent him from achieving what he had set out to do; and ultimately having to overcome the action brought by IEV itself' and/or

2.4. that –

'As advocates and solicitors the defendant owed the plaintiff a duty of care to explain and made aware of the protracted litigation that he was likely to encounter should he decide to act on its advice to exploit his invention. Had the defendant done so, that duty of care would have been discharged. A failure to do so on the other had gave rise to a breach of that duty of care.'

3. In so holding the learned Judge erred in fact and/or law and in failing to take into account the fact that these matters (or issues) stated by the learned Judge in his grounds of judgment were not the Respondent's pleaded case in his Statement of Claim and as such the Appellant was deprived of the opportunity to lead such evidence as would have established that the Appellant was not in breach of their duties in this regard.

4. In so holding as aforesaid the learned Judge also erred in failing to take into account or to give any or any adequate consideration to the following:

4.1. that the Appellant's 1st opinion of 28.7.1993 was not a general opinion but was written to advise the Respondent specifically on:

(a) the patentability of the Respondent's inventions; and

(b) the option of filing for a declaration of non infringement as a strategy to be adopted in the face of the threatened infringement action against the Respondent;

4.2. that the Appellant's 2nd opinion of 11.1.1994 was also not a general opinion but was written to advise the Respondent specifically:

(a) on the patentability of the Respondent's inventions; and

(b) that the Respondent would not infringe IEV's registered Malaysian patent.

5. In so holding as aforesaid the learned Judge also did not take into account or give any or any adequate consideration to the following material facts:

5.1. that there was no query or request by the Respondent for further or additional advice on any of the matters mentioned by the learned Judge;

5.2. that it would be reasonable, having regard to the circumstances of the case, for the Appellant to assume that the Respondent was aware of the issues pertaining to the duration of litigation or the costs of such litigation or that the Respondent would have asked the Appellant had the Respondent any genuine concern over any of the issues mentioned by the learned Judge in view of the fact, inter alia, that the Respondent was a man with experience:

(a) being a businessman;

(b) having '... worked as a Contract and Project Manager for IEV (SEA) Sdn Bhd',

(c) was '... overseeing operations on a world-wide basis',

(d) used to be '... the Operations Manager for Oceanering – the biggest underwater emergency company in the world at that time', and

(e) having '... had 10 years experienced in the oil and gas industry all over the world' and having '... worked in Malaysia, Australia, Middle East, Indonesia, Canada, UK and others.';

5.3. that the Respondent was himself, at all material times, well aware of the likely consequences including the likelihood of his being sued by IEV and that an injunction would be sought by IEV;

5.4. that if indeed the Respondent had any genuine concerns pertaining to how protracted the indicated litigation with IEV would be, or the financial and any other implications, he was himself sufficiently able to seek such advice as he may require from the Appellant, as is within the purview of the Appellant's practice;

5.5. that even before any action was filed by IEV against the Respondent and before either of the Appellant's said 2 written opinions were given, the Respondent had been given written notices dated 14.5.1993 and 6.7.1993 by IEV through IEV's solicitors, Messrs Ram Rais & Partners, and was fully aware that IEV would commence legal action and seek damages, injunctions and costs if the Respondent did not heed the demands made by IEV in their said notices;

5.6. that even before any action was filed by IEV, the Respondent had personally affirmed an affidavit stating on oath that IEV had threatened to and were likely

to unfairly and unjustifiably commence infringement proceedings and to obtain an injunction to restrain him and/or his agents;

5.7. that under cross examination the Respondent himself admitted that he was aware of the threat of legal action by IEV and that despite that fact, the Respondent proceeded to exploit his inventions;

5.8. that the ex parte Injunction obtained by IEV against the Respondent and Maelstrom on 3.3.1994, in the action brought by IEV against the Respondent and Maelstrom, was set aside on 17.3.1994, within 2 weeks;

5.9. that the action brought by IEV against the Respondent and Maelstrom was discontinued without a trial or the Respondent being held liable for any of IEV's claims; and/or

5.10. that both the said written opinions given by the Appellant were subsequently proven correct.

6. In holding the Appellant liable in negligence and/or in breach of its duty of care owed to the Respondent as aforesaid, the learned Judge also erred in law and/or fact in failing to take into account or to give any or any adequate consideration to the following:

6.1. that as a matter of causation no damage was, in fact and/or law, caused by the Appellant to the Respondent;

6.2. that the Originating Summons D4-24-224-93 filed by the Appellant on behalf of inter alia the Respondent as advised, was never served and was discontinued by the Respondent's new solicitors Messrs Skrine & Co and a fresh Originating Summons D4-24-44-94 was filed on behalf of the Respondent on 3.3.1994;

6.3. that the Appellant had ceased to be the solicitors for the Respondent when Originating Summons D4-24-44-94 was filed by Messrs Skrine & Co on behalf of the Respondent;

6.4. that in the suit brought by IEV against the Appellant, the Respondent was represented by Messrs Skrine & Co and not the Appellant;

6.5. that as a matter of causation, any damage financial or otherwise, suffered by the Respondent by reason of IEV's action or injunction was caused by IEV and not the Appellant;

6.6. that the ex parte Injunction obtained by IEV against the Respondent and Maelstrom on 3.3.1994 (in the action brought by IEV against the Respondent and Maelstrom) was set aside on 17.3.1994, within 2 weeks of its issue;

6.7. that any damage, financial or otherwise, suffered by the Respondent which was caused by IEV's ex parte injunction of 3.3.1994 was a matter of a claim by the Respondent against IEV under its undertaking as to damages given when obtaining the ex parte injunction of 3.3.1994;

6.8. that the Order of Court of 17.3.1994 setting aside the said ex parte injunction expressly reserved the issue of damages and costs to a date to be fixed stating as follows:

> '... IT *IS ORDERED that the Order dated 3rd March 1994 be and is hereby set aside in its entirety AND IT IS ALSO ORDERED that the* issue of *damages and costs be reserved to a date to be fixed.';*

6.9. that after IEV's said ex parte injunction was set aside on 17.3.1994, there was nothing in law to stop the Respondent from carrying on with the exploitation of his inventions;

6.10. that the action brought by IEV against the Respondent and Maelstrom was discontinued without a trial or the Respondent being held liable for any of IEV's claims; and/or

6.11. that the Appellant's 2 written opinions were both correct in fact and law.

PRELIMINARIES AND JURISPRUDENCE

[3] The judgment of the High Court has been reported (see *Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma)* [2006] MLJU 473; [2007] 1 CLJ 50). We do not intend to set out the full facts of the case save to say that this judgment must be read together with the judgment to appreciate our decision in the proper perspective.

[4] What is obvious in this case is that the learned trial judge has failed in law to appreciate the elements of negligence and professional negligence. In our view, the learned trial judge on the face of the judgment fell into grave error of law when the judge dealt with the case as it was a negligence case without taking into consideration the elements and the burden placed on the plaintiff's in professional negligence cases.

[5] In the instant appeal, at the commencement of the appeal, we enquired whether the case is one related to professional negligence. Both the counsel admitted so. Then we enquired whether experts or professionals were called to give evidence on 'standard of care' a very important element in professional negligence case for the plaintiff to succeed. That is to say that the 'Clapham Omnibus' reasonable man test will not be applicable in professional negligence case (see *Dato' Dr V Thuraisingam & Anor v Sanmarkan a/l Ganapathy & Anor* [2016] 3 MLJ 227; [2015] 8 CLJ 248; *Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742; [2016] 6 CLJ 225). The response from counsel was in the negative. On the *Clapham Omnibus* reasonable man test, the learned counsel for the appellant says:

4. In its most general form, the standard of care expected of an individual is that of a reasonable man.

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

See: *Blyth v Birmingham Waterworks* (1856) 11 Exch 781 at 784 – Tab 3

Quoted with approval by Richard Malanjum CJ in *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1 – Tab 10 ABA at p 19.

(see also: *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360 at pp 382–383 – Tab 4 AABA)

Similar expressions of this standard of care may be found in a litany of subsequent cases.

See:

(1) *Glasgow Corporation v Muir* [1943] A.C. 448 at p 457 – Tab 5 AABA;

(2) *A.C. Billings & Sons Ltd v Riden* [1958] A.C. 240 at p 255 – Tab 6 AABA;

(3) *Carmarthenshire County Council v Lewis* [1955] A.C. 549 at p 566 – Tab 7 AABA;

(4) *Hawkins v Coulsdon and Purley Urban District Council* [1954] 1 Q.B. 319 at p 341 – Tab 8 AABA;

(5) *Nettleship v Weston* [1971] 2 Q.B. 691 at p 699 – Tab 9 AABA.

5. In *Healthcare at Home Ltd v Common Services Agency* [2014] 4 All ER 210, Lord Reed, delivering the judgment of the English Supreme Court, observed that:

> [1] The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.
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> [2] The horse-drawn bus between Knightsbridge and Clapham, which Lord Bowen is thought to have had in mind, was real enough. But its most famous passenger, and the others I have mentioned, are legal fictions. They belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the bonus paterfamilias. As *Lord Radcliffe observed in Davis Contractors Ltd v Fareham Urban DC* [1956] 2 All ER 145 at p 160; [1956] AC 696 at p 728:
>
> > the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be,

the court itself.

See: *Healthcare at Home Ltd v Common Services Agency* [2014] 4 All ER 210 at p 213 – *Tab 10 AABA*

6. However, when the Court is concerned with professional negligence, the standard of care applicable has necessarily to be adjusted. In such cases, the Court needs to be guided by evidence led by members of the profession in question.

[6] We also observed that the element of standard of care and its breach was not pleaded according to the requirements of the law. In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, the Supreme Court had in strong terms held, and which still stands as a 'gold standard' in pleading rules and evidence, as follows:

> *It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point*. In disposing of a suit or matter *involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings*. The trial of a suit should be confined to the pleas on which the parties are at variance. (Emphasis added.)

(See: (i) *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590; [2016] 8 CLJ 293; (ii) *Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389; [2016] 7 CLJ 679).

[7] Both issues go to the heart of trial process. The failure of the trial judge who had omitted in law to deal with both the issues leads to grave misdirection of law and warrants the appellate court to allow the appeal in limine without even having to consider other issues raised by the parties. The judgment of the trial court on the face of record is not only perverse but has led to grave miscarriage of justice.

[8] The learned trial judge has taken upon himself to deem the case as a case of negligence simpliciter and chose to deal in his judgment issues relating to professional negligence, in a badly pleaded case of the plaintiff. Such an approach is bad in law.

[9] This is how the learned trial judge has dealt with the law:

> The law
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> To succeed in negligence the plaintiff is required to prove:
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> 1. that a duty of care was owed to him by the defendant;
> 2. that there was a breach of that duty of care; and

3. that in consequence thereof he suffered damages.

[10] On both the issues we mentioned earlier, we invited further submission on the following points which has been summarised by the learned counsel for the appellant and reads as follows:

1.1 the applicable standard of care in cases of professional negligence;

1.2 whether the standard of care is to be pleaded and if so how;

1.3 whether the Respondent pleaded the standard of care correctly; and

1.4 whether the learned Trial Judge addressed the issue of the applicable standard of care.

[11] In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. In the Federal Court decision of *Swamy v Matthews & Anor* [1968] 1 MLJ 138 at p 139 by FC Barakbah LP and we quote 'Now on the law. A man or a woman who practises a profession is bound to exercise that care and skill of an ordinary competent practitioner in that profession — be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier and Wife v Phipos* [1835-42] All ER Rep 421 Tindal CJ laid down this principle:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest, degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill'.

[12] In negligence case, there are, inter alia, three elements which need to be pleaded and established. However, in professional negligence case there is a fourth element which must be pleaded and proved and that is related to standard of care. Support for the proposition is found in a number of cases which the learned counsel for the appellant has summarised as follows:

> Standard of Care of Professionals — Generally
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> 7. In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. This dichotomy was clearly observed in *Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742; [2016] 6 CLJ 225.
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> 8. In the case of lawyers, as professionals, the standard of care expected appears well settled. In *Arthur J S Hall & Co (a firm) v Simons Barratt* [2002] 1 AC 615, Lord

Hobhouse of Woodborough made the following observations:

> The *standard of care* to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. *It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made. This is an important element of protection against unjustified liabilities.* (Emphasis added.)

9. Again in the oft-quoted case of *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571, Oliver J held as follows:

> It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. *The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession,* and cases such as Duchess of *Argyll v Beuselinck* , *Griffiths v Evans* and *Hall v Meyrick* demonstrate that the duty is directly related to the confines of the retainer. (Emphasis added.)

10. In *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183, Low Hop Bing JCA, delivering the judgment of the Court of Appeal, observed that:

> *A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession* — be it the profession of … a solicitor or otherwise *Swamy v Matthews & Anor* [1968] 1 MLJ 138 (FC), per Barakbah LP (as he then was) at p 139, applying *Lanphier and Wife v Phipos* [1835-42] All ER Rep 421 where Tindal CJ laid down this principle:
>
> > Every person who enters into a learned profession undertakes to bring to the exercise of it a *reasonable degree of care and skill. He does not undertake,* if he is an attorney, *that at all events you shall gain your case, … nor does he undertake to use the highest degree of skill* … but he undertakes to bring a fair, reasonable and competent degree of skill'.

11. In *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284, Harminder J (as he then was) made similar observations:

> *… it is now accepted that advocates and solicitors owe concurrent duties in contract and in tort* (*Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 *Saif AH v Sydney Mitchell*). *Their duty is to exercise reasonable degree of care and skill as with all professions. He or she is to be judged by what reasonably competent practitioners would do* although a lawyer is to be judged according to the standards of practitioners of his own standing and seniority. (Emphasis added.)

12. Thus, the standard of care expected of advocates and solicitors is a *reasonable degree* of care and skill judged according to what a reasonably competent practitioner would have done. The law does not demand that advocates and solicitors act according to the highest degrees of care and skill.

Standard of Care of Professionals — When Advising

13. In situations when the alleged negligence concerns advice being provided by a professional, the approach of the common law is to consider if there was an error of judgment and if so, whether it was one which a reasonably well informed and competent member of the profession would have made.

14. This standard is implicit in the statement expressed by Lord Diplock in *Saif Ali v Sydney Mitchell*:

> No matter what profession it may be, *the common law does not impose on those who practise it any liability* for damage resulting from what in the result turns out to have been errors of judgment, *unless the error was such as no reasonably well informed and competent member of that profession could have made*. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted on.

On the issue of pleadings, the learned counsel for the appellant says:

15. The learned authors of Bullen and Leake, in Volume 2 of its 18th Edition, 2016, at p 677, state that:

> Proper particulars need to be given of breach, setting out the respects in which it is said the defendant has fallen short of the standard to be expected of a reasonably competent professional in the relevant field of expertise.

Whether the respondent pleaded the standard of care correctly

16. The alleged breach of duty of care and the particulars thereof are provided in paragraph 18 of the Statement of Claim.

17. As has been submitted, the particulars of breach of duty in paragraph 18 of the Statement of Claim do not set out with any degree of specificity or certainty the respects in which it is to be said that the Appellant had fallen short of the standard of care expected of a reasonably competent professional in the Appellant's position.

18. Suffice to say that the finding of the learned Trial Judge that the Appellant had failed to advise the Respondent of the financial and litigation risks associated with the statement *'start exploiting your invention'* was not a complaint pleaded or indeed, as submitted, made by the Respondent.

[13] We have read the appeal record and the submission of the learned counsel. After much consideration to the submissions of the learned counsel for the respondent, we take the view that the appeal must be allowed in limine. Our reasons, inter alia, are as follows:

(a) it is well settled that in professional negligence, the burden is on the plaintiff to establish the standard of care has been breached before the defendant is required to call his witness to rebut the same (see *Dato' Dr V Thuraisingam & Anor v Sanmarkan a/l Ganapathy & Anor* [2016] 3 MLJ 227; [2015] 8 CLJ 248);

(b) in *Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742; [2016] 6 CLJ 225, the coram consisting of Hamid Sultan bin Abu Backer JCA, Badariah bt Sahamid JCA and Abdul Rahman bin Sebli JCA on this issue had this to say:

> (2) In cases of professional negligence and/or medical negligence, the appellant has to prove that there was: (i) duty of care; (ii) breach of standard of care; (iii) breach of duty of care; and (iv) the breach caused the damages. Therefore, the appellant had to lead evidence to show that the standard of care had been breached. The doctrine of *res ipsa loquitur* will not ordinarily apply as the appellant will have to discharge the legal burden. Only after the legal burden has been discharged, the respondents have to satisfy that the legal duty was not breached. (para 9)
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> ...
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> (4) The instant case is one of finding of facts. It is abundantly clear that the appellant had not proved the case according to law. The appellant attempting to rely on the principles on *res ipsa loquitur* in medical negligence without citing authorities stands as a 'misconceived submission' and if the argument is given judicial recognition, the jurisprudence relating to medical negligence will be placed in the same footing as road traffic accident cases, demolishing well-established cases relating to 'standard of care' and proof thereof. (para 14).

[14] It must be noted that *Dato' V Thuraisingam*'s case as well as *Shalini*'s case has been affirmed by the Federal Court.

[15] In the instant case, the failure of the learned trial judge to take cognisance of the pleading rules as to 'standard of care' and failing to appreciate the respondent has not satisfied the requirement of the elements of standard of care principles by way of evidence at the stage of the plaintiff case warrants the judgment to be set aside as of right.

[16] For reasons stated above, we take the view that the appeal must be allowed and the decision of the High Court must be set aside with costs. The respondent to pay costs of RM50,000 here and below subject to allocatur. Deposit to be refunded.

We hereby order so.

Appeal allowed; decision of High Court set aside with costs of RM50,000 here and below subject to allocatur.

Reported by Dzulqarnain Ab Fatar